MOTION FILED
FEB 23 1989

Nos. 88-515, 88-525

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

SABLE COMMUNICATIONS OF CALIFORNIA, INC.,
*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Appellees.*

**On Appeal from the United States District Court for the Central District of California**

## MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF MINORITY MEMBERS OF THE COMMITTEE ON ENERGY AND COMMERCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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## MOTION FOR LEAVE TO FILE BRIEF FOR MINORITY MEMBERS OF THE COMMITTEE ON ENERGY AND COMMERCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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The undersigned members of the United States House of Representatives hereby respectfully move for leave to file the attached brief as *amici curiae* in support of Appellees in this case. The Acting Solicitor General of the United States has given his consent to the filing of this brief. We have requested consent from Sable Communications of California, Inc., but have not yet received a response.

Movants are each of the Minority Members of the U.S. House of Representatives Committee on Energy and Commerce in the 101st Congress. This Committee has legis-

lative jurisdiction over the Communications Act of 1934 and oversight responsibility for the Federal Communications Commission. Movants were also each cosponsors of H.R. 1786 in the 100th Congress, the terms of which were enacted as Section 223(b) of the Communications Act of 1934, the constitutionality of which is now before the Court. H.R. 1786 was the subject of a hearing before the Subcommittee on Telecommunications and Finance in 1987. Nine of the seventeen Movants were Members of this Subcommittee at the time of this hearing. Thus, the disposition of these cases is of keen interest to the undersigned Members of Congress.

For this reason, Movants respectfully request this Court to grant leave to file this brief as *amici curiae*.

Respectfully submitted,

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## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| INTEREST OF THE AMICI | 1 |
| SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 2 |
| I. THE CONGRESSIONAL INVESTIGATION | 2 |
| II. THE NECESSITY OF DIRECTLY PROHIBITING DIAL-PORN | 6 |
| CONCLUSION | 9 |

## TABLE OF AUTHORITIES


| *CASES* | Page |
|---|---|
| Central Hudson Gas and Electric Corp. v. PSC of New York, 447 U.S. 557 (1980) | 7 |
| ***CONSTITUTION*** | |
| U.S. Const. Amend. I | *passim* |
| ***STATUTES*** | |
| Augustus F. Hawkins—Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, § 6101, 102 Stat. 424 (1988) | 2 |
| 47 U.S.C. §§ 151, *et seq.* | 8 |
| 47 U.S.C. § 157(a) | 4 |
| 47 U.S.C. § 223(b) | 2, 9 |
| 47 U.S.C. § 544(d)(2)(A) | 8 |
| 47 U.S.C. § 624(d)(2)(A) | 8 |
| ***LEGISLATIVE HISTORY*** | |
| 134 Cong. Rec.: | |
| pp. H1690-H1836 (daily ed. Apr. 19, 1988) | 2 |
| pp. H1709, 1712 (daily ed. Apr. 19, 1988) | 5 |
| pp. H1808-H1810 (daily ed. Apr. 19, 1988) | 6 |

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## BRIEF OF MINORITY MEMBERS OF THE COMMITTEE ON ENERGY AND COMMERCE OF THE UNITED STATES HOUSE OF REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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### INTEREST OF THE AMICI

We, the undersigned Members of Congress, hereby submit this brief as *amici curiae* in the above-captioned case, and hereby move for permission to file these comments in accordance with Supreme Court Rule 36. *Amici curiae* are each of the Minority Members of the U.S. House of Representatives Committee on Energy and Commerce in the 101st Congress. This Committee has legislative jurisdiction over the Communications Act of 1934 and oversight responsibility for the Federal Communications Commission. *Amici curiae* were also each cosponsors of H.R. 1786 in the 100th Congress, the terms of which were

enacted as Section 223(b) of the Communications Act of 1934, the constitutionality of which is now before the Court. H.R. 1786 was the subject of a hearing before the Subcommittee on Telecommunications and Finance in 1987. Nine of the seventeen *amici curiae* were Members of this Subcommittee at the time of this hearing. Thus, the disposition of these cases is of keen interest to the undersigned Members of Congress. We would appreciate the full and complete consideration by the Court of the arguments made herein.

## SUMMARY OF ARGUMENT

We submit this brief because it is essential that, to decide this case, the Court has a complete appreciation of the defects inherent in the regulatory and technological alternatives that were considered and rejected by Congress before it enacted a prohibition on obscene and indecent telephone transmissions for commercial purposes, or "dial-porn." Pub.L. No. 100-297 (1988), *codified at* Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1988). This is especially important in the case before the Court because, unlike most legislation, the only legislative history to be found to illuminate the purpose and reasons for which the statute was passed can be found in the Congressional floor debates on the "dial-porn" provision. *See* 134 Cong. Rec. H1690-H1836 (daily ed. Apr. 19, 1988) [hereinafter "*Record*"].

## ARGUMENT

### I. THE CONGRESSIONAL INVESTIGATION

In evaluating the constitutionality of the dial-porn ban, the Court must recognize that Congress investigated every alternative means of curbing dial-porn, and found that the current capabilities of the public telephone network made impossible any other solution which would have been effective while less directly implicating First

Amendment rights. The House undertook an exhaustive investigation of the present ability of the public telephone network to block access to dial-porn. The House examined every conceivable method by which access to dial-porn by children could be effectively curtailed, and all consequences of each method. Only after examining all alternatives did the House (and Congress) conclude that there were no regulatory alternatives to a ban on obscene and indecent language for commercial purposes that would have effectively barred access to dial-porn by children.

The House first examined a "presubscription" approach. "Presubscription" contemplates a system whereby anyone who wishes to receive a telephone "dial-it" service (including dial-porn) could do so only after subscribing to that service. This approach proved to be economically infeasible for telephone companies to administer. More importantly, the total presubscription approach would have had the unintended and undesirable effect of driving most of the "legitimate" dial-it services, like dial-sports, dial-realtor, etc., out of business. The utility of these services depends on easy access by the public; presubscription would have removed the ability of the average citizen to "dial up" an information service without first being required to contact the local telephone company and having the number(s) unblocked which he or she wished to dial. Moreover, under a presubscription approach, dial-it services would not be available to many customers who otherwise would access them by coin-operated pay telephones or from telephones other than their own.

The result would have been a severe and negative effect on the ability of "dial-it" providers to market service with no content that could be considered harmful to children. This action also would have raised First Amendment questions as to whether presubscription was the least restrictive alternative available to prevent children

from gaining access to dial-porn. Finally, this presubscription approach would have been contrary to Congress' recent determination that providing new information services to the public is in the public interest and should be encouraged. *See* Section 7(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 157(a) (1983).

Congress next considered a purely "technological" approach: requiring telephone companies to permit subscribers selectively to curtail access, or "block," certain telephone number(s). However, after exhaustive discussions with representatives of AT&T, the Bell Operating Companies, and other local and long-distance telephone companies, Congress soon discovered that this approach was infeasible as well. The information submitted to Congress by the telephone industry revealed that the public telephone network is not technologically sophisticated enough to permit a subscriber to call his local and long-distance telephone companies and request that particular telephone numbers be "blocked."

Moreover, Congress found that a pure "blocking" approach would not solve the problem entirely. Dial-porn services frequently do not inform telephone companies of the true purpose to which their dial-it line will be put; moreover, they switch numbers after a short time. As a result, telephone subscribers could never be certain that the numbers which were blocked were still dial-porn services, or that their telephone blocked all dial-porn services. Likewise, it would be impossible under such a scheme for telephone companies to ensure at all times that dial-it lines were being used for legitimate purposes and that dial-porn providers had not switched to new lines that were not blocked by subscribers' telephones. Finally, such a blocking system would not prevent children from gaining access to dial-porn from telephones located outside of their homes.

Since these "technological" solutions could not solve the problem of children's access to dial-porn, other regu-

latory approaches were considered by Congress. The approach rejected by the House during its April 19, 1988 debate proposed a regulatory mechanism that would have been ineffective in curbing access to dial-porn by children. Among other things, it did not prohibit obscene language that clearly can be forbidden under the precedents of this Court; it permitted interstate access to local dial-porn services, as well as to dial-porn services offered over long-distance "900" services; and it obligated telephone companies to block services only if it was "technologically feasible" to do so. *See Record* at H1709 (statement of Rep. Bliley); *Record* at H1712 (Rep. Coats). This proposal also attempted to place the burden of limiting the availability of dial-porn services to children on the telephone companies, not on the purveyors of the services themselves, as should properly be the case.

Moreover, Congress found credit card screening to be an inadequate regulatory safeguard which can be easily circumvented by minors using their own credit cards or those of their parents or by misusing the credit card numbers of others gained from carbon copies or other means. Since the transaction takes place by telephone, minors need only a credit card number, and not the credit card itself.

Finally, Congress found that any alternatives which employed only regulatory mechanisms would guarantee the continued availability of much dial-porn, since the regulatory scheme of the Communications Act gives the Federal government jurisdiction only over interstate calling. This was one reason that the alternative proposed by the Reagan Administration, banning obscenity coupled with regulating the provision of indecent dial-porn, would have been inadequate to solve the problem. No matter what regulatory mechanism was employed, the practical effect would have been to continue the availability of dial-porn within any State that did not itself have a law effectively regulating dial-porn within its borders.

The failure of technological and regulatory alternatives effectively to curtail dial-porn access by children left Congress with no alternative but to consider solutions with more direct First Amendment implications.

## II. THE NECESSITY OF DIRECTLY PROHIBITING DIAL-PORN

Obscene commercial speech, like certain other forms of speech, clearly is unprotected by the Constitution, and the Court should reaffirm that holding. The only controversial constitutional question before the Court is how indecent commercial speech transmitted through *one* medium of communications—the telephone—can be effectively regulated to keep children from gaining access to it in a manner consistent with the First Amendment. When the alternatives were examined, Congress found that nothing short of prohibiting obscene and indecent messages transmitted for commercial purposes achieved the goal of effectively curtailing access to dial-porn by children. The statutory prohibition applies only to dial-porn transmitted interstate or in the District of Columbia, and is consistent with the Communications Act scheme applicable to common carriers. However, the practical effect of the statute should be to curb dial-porn transmissions within a State as well, since any dial-porn provider could be prosecuted if a caller could reach its service across State lines.

The Court has alternate means of determining whether the dial-porn statute passed by Congress last year is consistent with the First Amendment. We continue to believe that the statute is a permissible "time, place and manner" restriction, consistent with Court precedents for half a century. After exhaustive examination, Congress determined that nothing less than completely restricting obscene and indecent commercial speech over the telephone would accomplish its goals of effectively curtailing access to dial-porn by children. *See Record* at H1808-H1810 (legal memorandum supporting constitutionality

of dial-porn section of H.R. 5 submitted by Hon. Thomas J. Bliley, Jr.).

Even if the Court rejects that analysis, we believe the remedy in the dial-porn statute also is permissible under the First Amendment test for commercial speech enunciated in *Central Hudson Gas and Electric Corp. v. PSC of New York*, 447 U.S. 557 (1980). *Central Hudson* provides that regulation of commercial expression will pass constitutional muster if (1) the governmental interest is substantial, (2) the regulation directly promotes that interest, and (3) the regulation is no more extensive than necessary to achieve that interest.

In applying either test, the Court must be aware of the unique characteristics of the telephone, as well as the unique limitations that exist on parents' ability to monitor and supervise its use. After considering the similarities, and differences, between the telephone and other communications media, the Court should find under either analysis that the restrictions of the new dial-porn law are narrowly crafted and necessary to achieve the Congressional objective of effectively curtailing children's access to dial-porn.

Many compare the dissemination of commercial messages by telephone with the dissemination of similar messages by radio. There are substantial similarities between the two modes of transmitting messages. A radio station sends out the same message to all sets tuned to that station; a recorded "dial-it" service sends out the same message to anyone dialing a given number. (A live dial-it service varies only in that the exact composition of the message varies; the general content of the message is the same each time.)

The telephone is a ubiquitous tool in today's society. The telephone is an essential link for all citizens with the outside world for emergency and other purposes. Indeed, the Federal government encourages "universal telephone service" through the Communications Act of

1934, as amended, 47 U.S.C. § 151, *et seq.* Unlike radio or any other communications media, the Government encourages each citizen to have a telephone in his or her home and to be able to use it. (Currently, telephones are in nearly 94 percent of American households.) Knowledge of how to use the telephone is deemed essential even for the younger child, and is encouraged especially in the event that an emergency occurs.

Effective parental supervision of a child's use of the telephone is uniquely impossible, due to the insufficient methods of preventing access to dial-it services that were described earlier. If a parent wishes to prevent his or her child from reading certain magazines in the home, he or she need only refuse to bring them into the home. If a parent does not wish for his children to listen to certain radio or television programs, the parent can turn off the set or even lock it away. If a parent wishes to prevent viewing of cable television programs, he or she can request a "lockbox" from the local cable company under the provisions of Section 624(d)(2)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 544(d)(2)(A).

However, Congress found that there is no effective mechanism through which a telephone subscriber can request that his telephone not be able to receive "dial-porn" services. The lack of technological and regulatory alternatives available in the telephone industry effectively to curtail the availability of dial-porn to children makes a prohibition on obscene and indecent telephone communications for commercial purposes the only means of ensuring that this harmful service will not be accessible to children.

## CONCLUSION

No technological or regulatory solution is available that would effectively bar access to dial-porn by children. Limiting dial-porn through technological or regulatory means would be ineffective because it would not resolve any problems of dial-porn access by children. Therefore, the only restriction that will effectively limit children's access to dial-porn is that contained in the 1988 statute passed by Congress: a complete prohibition on obscene and indecent language for commercial purposes by telephone.

Any peripheral infringement of dial-porn providers' freedom of expression is outweighed by the Government's compelling interest in effectively restricting minors' exposure to dial-porn. Both this Court and Congress recognize that children are a most precious resource of this Nation, and the state has a legitimate interest in safeguarding them from exposure to speech which is clearly harmful to their well-being. The nature of the harm to children from dial-porn is great, and is not in question. The unique problems associated with limiting access to pornography by telephone make it necessary for the state to ban directly the conduct in question. No other alternative will accomplish the goal.

Wherefore, for the reasons stated above, *amici curiae* members of the United States House of Representatives respectfully request that the judgment of the United States District Court, insofar as it applies to the indecency portion of Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 223(b) (1988), be reversed.

Respectfully submitted,

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